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Attorney for Land View Fertilizer, Inc.

In re:

Debtor.

OBJECTION TO CONFIRMATION OF AMENDED PLAN BY LAND VIEW FERTILIZER, INC.

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Amended Chapter 12 Plan of Reorganization ("Plan") filed by Terry Hipwell, the debtor, on or about March 31, 1997, upon the grounds that the Plan does not meet the requirements of 11 U.S.C. § 1222 and should not be confirmed pursuant to 11 U.S.C. § 1225 as more particularly explained below.

INTRODUCTION

Debtor filed a voluntary petition for relief on August 23, 1996. Ronald D. Schoen serves as the Chapter 12 trustee. Debtor initially filed his Chapter 12 Plan of Debt Adjustment on December 27, 1996. Debtor has subsequently filed two separate amended plans. On January 27, 1997, Land View filed an objection to confirmation of debtor's initial plan and incorporates the authority and discussion in the previous objection herein. A confirmation hearing on the latest plan submitted by debtor is scheduled for April 16, 1997.

Land View is a secured creditor of the debtor in the amount of \$176,759.80, plus interest under Proof of Claim filed December 18, 1996. On January 31, 1997, debtor filed an objection to Land View's claim. Land View filed a response to debtor's objection on February 28, 1997. Following a March 4, 1997, hearing, this court denied debtor's objections to the secured claim of Land View.

ARGUMENT

I. The Proposed Amended Plan Fails to Comply with the Mandatory Requirements for Confirmation Under 11 U.S.C. § 1225 of the Bankruptcy Code.

A Chapter 12 plan must meet a number of requirements under 11 U.S.C. § 1225 to be confirmable. These requirements are briefly that: (1) the Plan be proposed in good faith [§ 1225(a)(3)]; (2) the holder of the claim accepts the Plan, the Plan provides that the holder of such claim retain the lien and the value of the property is not less than the allowed amount of such claim [§ 1225(5)(A), (B)]; and (3) the Plan of reorganization be feasible [§ 1225(a)(6)]. Debtor's plan fails to conform with these provisions of § 1225 of the code, any one of which would be sufficient grounds for this court to deny confirmation.

A. The Plan is not Proposed in Good Faith as Required Under § 1225(a)(3).

Debtor was initially granted an extension of thirty days after the expiration of the 90-day period to propose and file a plan. Debtor filed an initial Plan in December, 1996, an Amended Plan in February, 1997, and filed a second Amended Plan in April, 1997. Despite the ample amount of time given to debtor, debtor has not been able to formulate a workable plan.

The Plan has not been proposed in good faith in the following respects. First, debtor has inappropriately determined that Land View is an undersecured creditor and not allowed post-petition interest and reasonable fees and costs as provided under 11 U.S.C. § 506(b). Land View has a secured claim, secured by the Canyon County property, crop proceeds held by the trustee in excess of \$100,000.00 and farm and irrigation equipment owned by debtor. There is no dispute that Land View is an oversecured creditor and thus, is allowed interest and reasonable fees and costs on such claim. Debtor's classification of Land View as undersecured is only the result of debtor's proposal to use cash collateral. Second, the Plan does not provide that Land View shall retain its lien in irrigation equipment and other farm equipment. This is in violation of § 1225(a)(5)(B)(i). In its Proof of Claim, Land View has shown that it has a perfected security interest in the irrigation equipment and farm equipment. Third, debtor at p. 17 of the Plan proposes to use \$34,801.25¹ of the proceeds derived from the sale of the 1995 sugar beet crop to fund debtor's farming operation. This amount, however, has been determined by this court to be subject to a right of setoff by TASCOS. This \$34,801.25 amount is, therefore, not available to debtor for operating expenses.

¹Land View contests TASCOS's holding of the sugar beet crop proceeds from the Murphy property and contends TASCOS is contractually obligated to pay this to Land View.

B. The Plan Violates § 1225(a)(5).

11 U.S.C. § 1225(a) precludes confirmation of the plan unless,

(5) with respect to each allowed secured claim provided for by the plan--

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; . . .

Land View obviously does not accept the Plan. The Plan also does not retain Land View's lien on the crop proceeds held by the trustee. Further, as discussed more fully below, debtor has proposed to use Land View's cash collateral from the sale of the crops which, if allowed, would mean that Land View would receive the value of property less than the allowed amount of its claim. The Plan, therefore, is in violation of § 1225(a)(5) and cannot be confirmed.

C. The Plan is not Feasible.

Section 1225(a)(6) requires that the debtor be able to make all payments under the plan. The burden of proving feasibility is placed upon the debtor. *In Re Lakeside Global II, Ltd.*, 116 B.R. 499, 505 (Bankr. S.D. Tex. 1989). In order to establish feasibility, "the debtor must show by concrete evidence that there will be sufficient cash

flow to fund the plan and maintain operations according to the plan." *In Re Briscoe Enterprises, Ltd.*, 138 B.R. 795, 805 (Bankr. N.D. Tex. 1992).

Debtor's future income projections necessary to finance the Plan are unrealistic and speculative. Moreover, debtor's expense projections are unrealistically low. Land View is prepared to present evidence at the confirmation hearing establishing that debtor's projected yields for the proposed crops are inaccurate. Since debtor has never planted bean or clover seed, he is inexperienced in the growing of these crops. Superimposed on this is debtor's prior poor performance in growing crops. Debtor has not been able to meet his own operating projections in the past and has suffered serious financial problems. Thus, the debtor will not be able to make all the payments under the Plan and to comply with the Plan as required by § 1225(a)(6).

II. *Debtor May Not Use the Cash Collateral Arising From Land View's Security Interest to the Crop Proceeds.*

Debtor, in his Plan, has requested to use over \$100,000.00 of Land View's cash collateral for expenses associated with farming operations. At the time debtor filed his petition in bankruptcy in 1996, Land View had a claim of \$176,759.80, plus interest, secured by real property, farm and irrigation equipment and all crops growing or to be grown by debtor. Land View is substantially oversecured.

11 U.S.C. § 363 defines the term "cash collateral" and sets forth the standards which must be met in using this type of collateral. A debtor cannot use cash collateral unless the secured creditor consents to the use or the court enters a cash collateral order permitting the use after a hearing is held. § 363. Land View obviously does not consent to debtor's use of the cash collateral. Therefore, if cash collateral is going to be used, debtor is required under § 363 to provide notice of any use of cash belonging to Land View and provide an opportunity for objections to be filed. Without an order from this court allowing the use of cash collateral, debtor's Plan of Reorganization is merely based on guesswork.

III. *Land View, as a Secured Creditor, is not Adequately Protected Under the Plan.*

Land View has a secured interest in the Canyon County property, the proceeds from the sale of the 1996 wheat crop and the 1995 sugar beet crop, and certain farm and irrigation equipment. Debtor proposed under the Plan that he use the cash collateral from Land View's crop proceeds to finance operating expenses. Debtor proposes to grant a replacement lien on the Payette County property to Land View for the use of its cash collateral. However, it is patently evident from the Plan that Land View's secured interest in the cash collateral will not be adequately protected by the proposed replacement lien.

Any time a debtor seeks to use cash collateral, 11 U.S.C. § 363(e) mandates that "the court . . . shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest." In Chapter 12 cases, 11 U.S.C. § 1205 specifies the methods by which adequate protection may be provided. Debtor has offered in his Plan to provide adequate protection to Land View under § 1205(b)(2). The purposes for providing adequate protection for the use of cash collateral under § 363 is "to ensure that the secured creditor receives in value essentially what he bargained for." *Delbridge v. Production Credit Association & Federal Land Bank*, 104 B.R. 824, 828 (Bankr. E.D. Mich. 1989). The debtor in a Chapter 12 case has the burden of proving adequate protection. *In Re Stacy Farms*, 78 B.R. 494, 497 (Bankr. S.D. Ohio 1987). In meeting this burden, "a debtor must prove by clear and convincing evidence that the secured creditor will realize the value of its bargain." *Northern Trust Co. v. Leavell*, 56 B.R. 11, 13 (Bankr. S.D. Ill. 1985).

Debtor has barely made an attempt in his Plan to adequately protect Land View for the use of its cash collateral. Debtor proposes to provide a replacement lien on the Payette County property, but, at the same time, does not provide any payment to Land View for its secured interest in the Canyon and Payette County properties. Further, debtor, under the Plan, takes Land View's oversecured claim and, after proposing to use its cash collateral, turns the claim into an undersecured claim. Given

the nature of cash collateral, the bankruptcy decisions have uniformly recognized that this type of collateral "must be well protected." *In Re Stacy Farms*, 78 B.R. at 499. Debtor's Plan fails to do this and, therefore, cannot satisfy the adequate protection requirements of 11 U.S.C. § 1205.

IV. *The Plan Discriminates Between Creditors in the Same Class.*

The Plan does not comply with the requirements of § 1222(a)(3) which mandates that each claim within a particular class be provided the same treatment unless the holder of a particular claim agrees to less favorable treatment. Debtor lists in his Plan the following creditors under Class I--Liens on Real Property: Land View, Payette County Assessor, Canyon County Assessor, Idaho State Tax Commission, and Travelers Insurance Company. All creditors in this class are proposed to be paid under the Plan, except Land View. Debtor has not proposed any payments to Land View, despite Land View's mortgage on the Canyon County property. Land View's lien secures a promissory note dated May 6, 1996, in the amount of \$126,563.46 at 14 1/2% per annum. Debtor brought a motion objecting to Land View's lien on the Canyon County property, but this court denied the objection at the hearing of this matter. Land View's secured claim deserves payment under the Plan, but debtor has failed to do so. Land View does not accept this unfavorable treatment.

CONCLUSION

Based upon the foregoing, and following the submission of evidence and argument at the confirmation hearing, Land View prays the court to deny confirmation of the Plan and to reject any request of the debtor for an opportunity to file yet another plan.

DATED this 9th day of April, 1997.

WHITE, PETERSON, PRUSS,
MORROW & GIGRAY, P.A.

By John D. Harrington
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Attorneys for Land View Fertilizer, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing Objection to Confirmation of Amended Plan by Land View Fertilizer, Inc. was served upon the following:

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this 9th day of April, 1997.

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